services rendered with no idea of remuneration,[14] that is, for the ordinary exchange of gratuities among those living in a family relationship; or for services rendered with an express assurance that there would be no charge therefor.[15] But the presumption of gratuitous services among those living in the family relation must be qualified to this extent, that if the circumstances in which the services are rendered are such as to show a reasonable and proper expectation that compensation is to be made, plaintiff will be entitled to recover even in the absence of an "express" contract.[16] This presumption should not be peculiar to blood relatives but should go back to the contractual intention. Is the service rendered something which exists in the ordinary family relationship or something the parties would intend to contract about? Whenever the contractual relation is established, dependent on the kind of services rendered, whether the parties be blood relatives or not, the contract should be given effect. Of course, the presumption of gratuities is more easily rebutted as the degree of relationship diminishes, but the argument is that it should not exist, as the authorities hold it does exist, in the case of aunts and nieces, brothers and sisters, and other close relatives.[17] Such relationships should not of themselves rebut the legal presumption of an implied contract arising from services rendered.

It is quite apparent, then, that certain persons living in a family relationship do certain things gratuitously. This is ordinarily confined to the pure family relation and services would be such as are ordinarily gratuities. Blood relationship is involved only because as a general rule those in the family relation are blood relatives, and a false conclusion, making a general application of the presumption of gratuities in all cases of blood relationship, has followed from this. It could not be said today that blood relatives ordinarly live in a family relationship, and, therefore, no presumption should exist from such proof alone.

M. H. V. G.

SALES: LIABILITY OF EATING HOUSE KEEPER FOR WHOLESOMENESS OF FOOD SERVED TO GUESTS.—Plaintiff, in the case of *Loucks v. Morley*,[1] suffered a violent and protracted illness alleged to have been induced by eating unwholesome rice pudding served to him while a guest at defendant Morley's restaurant. The plaintiff did not allege negligence on the part of defendant, but based

[14] Gomez v. Johnson (1899) 106 Ga. 513, 32 S. E. 600.

[15] Cochran v. Zachery (1908) 137 Ia. 585, 115 N. W. 486; Castle v. Edwards (1895) 63 Mo. App. 564; Swires v. Parsons (1843) 5 Watts and S. (Pa.) 357.

[16] Disbrow v. Durand (1892) 54 N. J. Law 343, 24 Atl. 545; Carpenter v. Weller (1878) 15 Hun (N. Y.) 134.

[17] Hurst v. Lane (1898) 105 Ga. 506, 31 S. E. 135; Riley v. Riley (1893) 38 W. Va. 283, 18 S. E. 569.

[1] (Feb. 4, 1919) 28 Cal. App. Dec. 236, 179 Pac. 529.

his right of recovery on an implied warranty alleged to arise under section 1775 of the California Civil Code. The court, however, relying primarily on the leading case of Sheffer v. Willoughby[2] and a well-known American authority on innkeepers[3] which represent the prevailing view, found that the transaction between the guest and the restaurateur never constituted a sale; that there could therefore be no recovery on the theory of an implied warranty. A showing of negligence is necessary in such cases, according to this rule, to support an action. It was further held that even though the court were to admit that a sale took place, the plaintiff could not recover, for the only implied warranties recognized in California are those provided for in the Civil Code. Section 1775 was said to be the only provision applicable, and it provides for sales of food for domestic consumption only. A sale in a restaurant is not one for domestic use, the court found, so it falls outside the scope of the section.

Although the holding might have been based on an old statute and gradually extended by mistake, yet unquestionably it was early recognized in the common law that "in contracts for provisions it is always implied that they are wholesome, and if they be not, the same remedy (damages for deceit) may be had."[4] The modern law probably would not go so far, but does undoubtedly imply a warranty where the seller is a dealer disposing of food for immediate consumption.[5] It may be said that there must be reliance on the seller's skill and judgment in the selection of the food, but the mere fact of purchase of a dealer for immediate consumption is generally all that is required to assume such reliance.[6] The extent to which this principle has been carried may be seen in cases where retail dealers have been held liable for damages caused by unwholesome canned goods.[7] There is nothing unusual or inconsistent about this, however, for if the dealer is held to warrant at all, negligence or knowledge is immaterial, a warranty being an absolute liability.[8] Some courts

[2] (1896) 163 Ill. 518, 45 N. E. 253, 34 L. R. A. 464, where the defendant served an unwholesome oyster stew. Resting on the assumption that the transaction is not a sale, the general rule has been against an implied warranty and in favor of reasonable care only in respect to quality and preparation. See Valeri v. Pullman Co. (1914) 218 Fed. 519; Bigelow v. Maine Central R. R. Co. (1912) 110 Me. 105, 85 Atl. 396, 43 L. R. A. (N. S.) 627; Travis v. Louisville etc. R. R. Co. (1913) 183 Ala. 415, 62 So. 851; Merrill v. Hodson (1914) 88 Conn. 314, 91 Atl. 533.

[3] Beale, Innkeepers and Hotels, § 169.

[4] Williston, Sales, § 241, quoting 3 Bl. Comm. 165.

[5] Mechem, Sales, § 1356; 32 Harvard Law Review, 71; Nelson v. Armour Packing Co. (1905) 76 Ark. 352, 90 S. W. 288, 15 L. R. A. (N. S.) 884, n. 1; Wiedman v. Keller (1898) 171 Ill. 93, 49 N. E. 210. See also 2 California Law Review, 157.

[6] Williston, Sales, § 242. Massachusetts apparently requires proof of actual reliance on the seller's judgment. See Farrell v. Manhattan Market Co. (1908) 198 Mass. 271, 84 N. E. 481.

[7] Sloan v. F. W. Woolworth Co. (1915) 193 Ill. App. 620.

[8] Williston, Sales, § 237.

and writers apparently overlook this fact.[9] There can be no middle ground, however, and a seller is liable either regardless of negligence or on the ordinary principles of negligence only.

That the transaction between host and guest at a modern eating house does under some conditions constitute a sale is established. In the first place, courts hold uniformly that the serving of game, liquors, and adulterated foods at eating houses of any kind violates statutes prohibiting the "sale" of such commodities.[10] Again, where one buys and pays for a definite portion, as in the case of á la carte orders, cafeteria service, etc., why should the question of whether a sale is effected depend upon the answer to the question, "Will you eat it here, or take it with you?" However the old case of Parker v. Flint[11] held that the restaurateur does not sell but "utters" his food. The Massachusetts court recently held that it could find no difference between the "liability of a retail dealer of meat for immediate consumption and a victualler who serves food to guests to be eaten forthwith at his own table. Every argument which supports liability of the former tends to establish liability of the latter with equal cogency. They appear to us to rest upon the same footing in principle."[12] One court, while recognizing the fact that the service of food in definite proportions may be a sale, refused to imply a warranty, upon the ground that no such warranty was implied against victuallers at common law, and that the principle should be curtailed rather than extended.[13] The Supreme Court of New York, however, has repeatedly held the transaction to be a sale with an implied warranty.[14] The Court of Appeals held that a druggist serving ice cream of his own make which contained a filth product, rendering the food poisonous, warranted the article sold (apparently as a manufacturer)

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[9] See Tavini v. Swift & Co. (1918) 105 Atl. 55 (Pa.). Also comment on this case in 3 Minnesota Law Review, 285.

[10] Commonwealth v. Worcester (1879) 126 Mass. 256, (intoxicants with meals); State v. Lotti (1900) 72 Vt. 115, 47 Atl. 392 (liquor with meals); Commonwealth v. Warren (1894) 160 Mass. 533, 36 N. E. 308 (impure milk served with meals); People v. Clair (1917) 221 N. Y. 108, 116 N. E. 868, L. R. A. 1917F, 766 (partridges served out of season); Commonwealth v. Phoenix Hotel Co. (1914) 157 Ky. 180, 162 S. W. 823 (quail served out of season); Commonwealth v. Miller (1890) 131 Pa. 118, 18 Atl. 938, 6 L. R. A. 633 (oleomargarine served with meals).

[11] (1701) 12 Mod. 254, 88 Eng. Rep. 1303.

[12] Friend v. Child's Hall Dining Co. (1918) 120 N. E. 407 (Mass.). See also 24 Yale Law Journal, 73; 32 Harvard Law Review, 71; 17 Michigan Law Review, 261.

[13] Valeri v. Pullman Co., supra, n. 2.

[14] Leahy v. Essex Co. (1914) 164 App. Div. 903, 148 N. Y. Supp. 1063 (unwholesome food procured at a lunch counter); Rinaldi v. Mohican Co. (1916) 171 App. Div. 814, 157 N. Y. Supp. 561 (tainted meat bought of butcher, but the case follows the restaurant cases, and points out that there is no distinction); Muller v. Childs Co. (1918) 185 App. Div. 881, 171 N. Y. Supp. 541 (restaurant case); Barrington v. Hotel Astor (1918) 184 App. Div. 317, 171 N. Y. Supp. 840 (meal procured at hotel).

but reserved the question of a restaurateur.[15] There seems no distinction, between the two situations, however, and the Supreme Court afterwards held in the famous case of Barrington v. Hotel Astor[16] that a guest who became violently ill as a result of eating a portion of a service of kidney sauté which he discovered to contain a mutilated mouse upon looking into the dish for his second helping, was entitled to an action on the ground of an implied warranty.

If it were to be admitted that the transaction in question does not constitute a sale, still it does not follow as is frequently held, (and this seems to be the holding of the principal case), that a warranty could not attach. "The basis of implied warranty is justifiable reliance on the judgment or skill of the warrantor", and to hold a grocer who sells a sealed can of peas with no opportunity of examination while attaching no liability to the restaurant keeper who opens the can and serves the peas is clearly inconsistent. The question of pure food is so vital a matter of public policy that it should be enforced even though the warranty be held to attach to the contract for the privilege of consuming food.[17]

Some courts have reached the result of holding the server of food absolutely liable on the theory of a positive duty, and have gone farther than the cases based on a strict theory of warranty, for in the latter cases the seller is liable to the buyer only, while in the cases resting on the "positive duty" theory the seller has been held liable to all who may lawfully use the article. This class of cases extends the principle of Thomas v. Winchester[18] regarding things inherently dangerous. '"There is a tendency to include not only commodities whose very existence is fraught with danger to owner and public . . . . , but also those whose normal use would result with reasonable certainty, in personal harm to the user, if not properly made."[19] In this class have been included food, bottled drinks, soap, and drugs.[20] This absolute tort liability has been applied by other courts which have talked about negligence, although there was no allegation or proof of negligence.[21] Other courts overlooking the real

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[15] Race v. Krum (1918) 222 N. Y. 410, 118 N. E. 853.

[16] Supra, n. 14.

[17] Friend v. Child's Hall Dining Co., supra, n. 12; 27 Yale Law Journal, 1068. See also 32 Harvard Law Review, 71.

[18] Thomas v. Winchester (1852) 6 N. Y. 397, 57 Am. Dec. 455.

[19] 25 Yale Law Journal, 679.

[20] Parks v. Yost Pie Co. (1914) 93 Kans. 334, 144 Pac. 202, L. R. A. 1915C, 179 (food); Boyd v. Coca-Cola Bottling Works (1915) 132 Tenn. 23, 177 S. W. 80; and Jackson Coca-Cola Bottling Co. v. Chapman (1914) 106 Miss. 864, 64 So. 791 (bottled drinks—in the latter case a dead mouse was discovered after the contents had been drunk).

[21] Doyle v. Fuerst & Kraemer (1911) 129 La. 828, 56 So. 906, 40 L. R. A. (N. S.) 480, Ann. Cas. 1913B, 1110.

basis of the decisions have cited the last group of cases as authorities for the negligence theory.[22]

The exploded and erroneous view of the nature of a pleading under the modern system, known as the "theory of the case" has given emphasis in cases in which guests have sought to hold victuallers for serving unwholesome or dangerous food. For example, the Supreme Court of Massachusetts allowed recovery on the theory of implied warranty in a case in which plaintiff was injured by "biting down hard" upon a stone served by defendant in a dish of beans,[23] and on the same day refused recovery on an allegation of negligence in a case in which plaintiff was served berries containing a small tack which caught in her throat.[24] Why, in these days when the forms of action are supposedly dead, a person should lose a case because of a surplus allegation of negligence it is hard to understand. This blind worship of the theory of a complaint has led to such great confusion, that a current writer summarizes the situation as follows: "Thus New York and Massachusetts seems fairly well settled on both theories, but otherwise the whole result is Biblical, authority for both sides upon either theory."[25] There seems after all to be little if any difference between a liability based upon an implied warranty and a positive duty based upon public policy. Both operate irrespective of negligence, and the same facts will support either. Peculiar as it may seem, however, the courts require privity for recovery in cases resting on the theory of warranty but not in those resting on the theory of tort liability. This distinction is questionable, although established, for warranty was originally a purely tort action.

While the holding of the principal case to the effect that the only warranties in California are those provided for in the Civil Code is correct;[26] yet according to the principles discussed above, its findings that there was no sale, that § 1775 was the only section involved, that it did not apply, and that plaintiff's only chance of recovery was upon a theory of warranty, are all extremely doubtful holdings.

There is some reason at least for holding that § 1775 should apply, for to interpret that section as applying to those transactions only where the food bought is carried home before being eaten, under the construction that "domestic use" refers to home use only, is a very strict interpretation.[27]

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[22] Pantaze v. West (1913) 7 Ala. App. 799, 61 So. 42; Greenwood Cafe v. Lovinggood (1916) 197 Ala. 34, 72 So. 354.

[23] Friend v. Child's Hall Dining Co., supra, n. 12.

[24] Ash v. Child's Hall Dining Co. (1918) 120 N. E. 396 (Mass.).

[25] 17 Michigan Law Review, 261, 264; Bark v. Dixon (1911), 115 Minn. 172, 131 N. W. 1078, Ann. Cas. 1912D, 775, holds that the same facts will support recovery on either theory.

[26] Cal. Civ. Code, § 1764; 2 California Law Review, 156; Browning v. McNear (1904) 145 Cal. 272, 78 Pac. 722.

[27] Such an interpretation of "domestic use" is at least not the only

Section 1769 regulating the sale of goods of one's own manufacture might also apply. The court cites an old California case[28] taking a strict view, but "The word 'manufacturer' is given a wide meaning in the law of implied warranty. All sellers who produce the article which they sell are classed in this category—thus a grower of plants or seeds, and one who has bred horses or cattle are included."[29] New York courts have included the maker of ice cream and the restaurant keeper.[30] Section 1769 of the Civil Code is peculiar and hard to understand, however. After providing for an absolute liability for defects arising out of the process of manufacture, the legislature has added that there shall be liability also for the use of improper materials knowingly. This second provision may be so interpreted as practically to defeat the whole section, since most defects arise out of an improper use of materials, and to prove their use knowingly would be practically impossible.

D. J. W.

TORTS: TRESPASS BY ANIMALS UPON UNENCLOSED LANDS IN CALIFORNIA.—It was the rule at common law that the owner of animals was bound at his peril to keep them within his own close, and if they escaped and trespassed upon the land of another, the owner was liable in damages. Two recent decisions in the District Court of Appeal call attention to the intricate state of the California law on this subject. It was held in *Davis v. Blasingame*[1] that the common law rule prevails in Fresno County, and in *Montezuma Improvement Co. v. Simmerly et al.*[2] that the rule is not in force in Mendocino County. These cases are not opposed, the difference between them being due to the fact that there is no uniform law on the subject in California. To determine the law in any county, a special expedition through the uncharted wilderness of early local statutes is necessary.

Originally, the common law rule prevailed nowhere in the state. On April 13, 1850, the legislature adopted the common law of England "so far as it is not repugnant to or inconsistent with the constitution of the United States, or the constitution or laws of the state of California" as the rule of decision in all courts.[3] But before that the legislature had passed an "Act concerning Lawful Fences, and Animals trespassing on Premises

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consistent view, for why can it not mean a sale to an individual for immediate consumption rather than to a dealer for resale? See Nelson v. Armour Packing Co., supra, n. 5.

[28] Corrio v. Lynch (1884) 65 Cal. 273, 3 Pac. 889.

[29] Williston, Sales, § 240.

[30] Race v. Krum, supra, n. 15; Barrington v. Hotel Astor, supra, n. 14.

[1] (Mar. 27, 1919) 28 Cal. App. Dec. 730.

[2] (Feb. 25, 1919) 28 Cal. App. Dec. 418.

[3] Cal. Stats. 1850, p. 219, Cal. Comp. Laws 1850-53, p. 186.